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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 18/2018 concerning Mateusz Piskorski (Poland)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 18 December 2017, the Working Group transmitted to the Government of Poland a communication concerning Mateusz Piskorski. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mateusz Piskorski is a 40-year-old Polish citizen who usually resides in Szczecin, Poland.

5. According to the source, Mr. Piskorski previously worked at the National Broadcasting Council and was the Deputy Director of Polish Radio Euro. He was employed as an academic at the University of Szczecin, as an adjunct professor at the Jan Długosz Academy in Czestochowa and as the Dean of the Faculty of Political Sciences at the Academy of International Relations and American Studies. He holds a doctoral degree in political sciences.

6. In 2007, together with other individuals, Mr. Piskorski founded and headed the European Centre for Geopolitical Analysis, and became its Vice-President and later its Secretary-General. The Centre is reportedly a think-tank, dealing with geopolitics, and it runs a well-known Internet site.

7. Since the 1990s, Mr. Piskorski has belonged to several political parties, including the Polish Peasant Party, the Polish Self-Defence Party and the Polish Labour Party. Between 2005 and 2007, he was a Member of the Polish Parliament, as a representative of the Polish Self-Defence Party. During his term of office, he was a member of the Sejm Foreign Affairs Committee. He was also a press spokesperson for the Polish Self-Defence Party. After the termination of his parliamentary activity, on 21 February 2015, Mr. Piskorski was elected as a Chair of the newly formed political party, Change (Zmiana).

Arrest and detention

8. According to the source, Mr. Piskorski was arrested on a street in Warsaw on 18 May 2016 by officers of the Internal Security Agency, pursuant to a warrant issued by the National Public Prosecutor's Office, Department for Organized Crime and Corruption. He was arrested on the basis of article 244 of the Code of Criminal Proceedings on suspicion of committing an offence, namely espionage under article 130 (1) of the Criminal Code. Article 130 (1) states that anyone who takes part in the activities of a foreign intelligence service against Poland is liable to imprisonment for between 1 and 10 years.

9. On that same day, criminal charges were presented to Mr. Piskorski (charge No. 1). He was accused of the following: "within a period from an unknown date, not later than from 2013 to 18 May 2016, in Warsaw and other Polish cities and in the Russian Federation, he participated in the activities of the Russian civilian intelligence (through the Foreign Intelligence Agency and the Federal Security Service) directed against the Republic of Poland."

10. The source reports that Mr. Piskorski was accused of participating in multiple operational meetings in the Russian Federation with persons who officially represented Russian non-governmental organizations, but were in fact contacts of the Russian intelligence services. It is alleged that Mr. Piskorski was aware of this, and through these persons, carried out operational tasks as part of the information warfare conducted by the Russian Federation, including manipulating the mood and attitudes of Polish society. Mr. Piskorski is alleged to have received remuneration for carrying out these tasks.

11. The charges were presented to Mr. Piskorski in the course of the investigation conducted by the National Public Prosecutor's Office. The investigation in this case is being conducted by the Internal Security Agency under the supervision of the National Public Prosecutor's Office. Much of the evidence is classified and available only in special premises at the Prosecutor's Office or in the court. Neither Mr. Piskorski nor his lawyers can access these materials freely.

12. On 19 May 2016, the National Public Prosecutor's Office requested the District Court of Wola, Warsaw, to order the pretrial detention of Mr. Piskorski for a period of three months. The source states that this request only described the charges and its reasoning was classified. The case materials were sent to the Court and consisted of 17 volumes with further attachments.

13. On 20 May 2016, the District Court of Wola ordered the pretrial detention of Mr. Piskorski until 16 August 2016. The Court only made the non-classified part of the written reasoning available, noting that the evidence described in the classified part of the request by the National Public Prosecutor's Office indicated that there was a high probability that Mr. Piskorski had committed the alleged crime. The Court also pointed to the possibility of imposing a severe penalty and the concern that Mr. Piskorski might obstruct the proceedings in an unlawful way, given that he was accused of clandestine activity. The decision of 20 May 2016 was appealed by Mr. Piskorski's lawyers, and an interlocutory appeal was held on 25 May 2016. On 27 June 2016, the Ninth Criminal Division of the Regional Court of Warsaw upheld the decision of the District Court to order pretrial detention.

14. According to the source, Mr. Piskorski is being held in pretrial detention on the basis of the following three articles of the Code of Criminal Proceedings: article 249 (grounds and mode of application of preventive measures, including pretrial detention/detention on remand); article 258 (specific bases for ordering pretrial detention/detention on remand), and article 263 (duration of detention on remand). More specifically, the authorities have given the following reasons for Mr. Piskorski's detention: (a) there is a high probability that the crime of espionage has been committed; (b) there is justified concern that he might escape or go into hiding; (c) there is justified concern that he might try to persuade others to give false testimony or obstruct the proceedings in other unlawful ways; (d) the severe penalty that may be imposed on him; and (e) the performance of evidentiary procedures in a particularly complicated case.

15. The pretrial detention of Mr. Piskorski has reportedly been extended by the courts every three months. Mr. Piskorski is currently being detained at Areszt Śledczy Warszawa, Służewiec, ul. Kłobucka 5, 02-699 in Warsaw.

16. The source reports that during the investigation against Mr. Piskorski, the National Public Prosecutor's Office issued two decisions supplementing the charges against him, on 14 June 2017 (charge No. 2) and on 18 October 2017. By the decision of 14 June 2017, Mr. Piskorski was accused, between an unspecified date and 23 October 2015, of taking part in intelligence activities in Warsaw and other unspecified places on behalf of China. These activities were allegedly directed against Poland. Mr. Piskorski is alleged to have drafted and, using a secure communication channel, transmitted an intelligence report to the Chinese authorities on 23 October 2015. This report allegedly concerned the possible implications of the Polish parliamentary elections in 2015 for Polish-Chinese relations, in particular opportunities for and threats to Chinese regional cooperation initiatives in central and eastern Europe, and proposed directions of action.

17. On 18 October 2017, the National Public Prosecutor's Office amended and supplemented charge No. 1, while charge No. 2 remained the same.

18. On 8 November 2017, Mr. Piskorski's pretrial detention was reportedly extended until 18 January 2018 by a decision of the Second Criminal Division of the Appellate Court of Warsaw. Mr. Piskorski's lawyers appealed that decision. On 6 March 2018, the Appellate Court confirmed the extension of Mr. Piskorski's detention until 7 May 2018, and his lawyers have also appealed this decision. When Mr. Piskorski's detention is reviewed in May 2018, he will have been in detention for almost two years without trial since his arrest on 18 May 2016. Mr. Piskorski remains detained under charge No. 1, as amended, and under charge No. 2.

Analysis of violations

19. The source submits that Mr. Piskorski's deprivation of liberty is arbitrary under categories I, II and III.

Category I: lack of legal basis for detention

20. The source submits that the pretrial detention of Mr. Piskorski was applied and extended without a legal basis. His pretrial detention is based on court decisions interpreting the relevant provisions of law, notably articles 249, 258 and 263 of the Code of Criminal Proceedings. According to article 249 (1), preventive measures (including pretrial

detention) may be ordered only if, according to the evidence already collected, it is highly probable that that the accused committed the offence. Preventive measures can be ordered only when certain behaviour of the accused fulfils the definition of an alleged offence. However, the source argues that, given the wording of article 130 (1) of the Criminal Code, and the wording of the criminal charges against him, Mr. Piskorski's deprivation of liberty is not founded under article 249 of the Code of Criminal Proceedings.

21. The source also submits that the wording of article 130 (1) of the Criminal Code, under which Mr. Piskorski has been charged, is very general. Espionage cases are not common in Poland, and the elements of this crime have not been sufficiently defined in case law. In these circumstances, the courts have a special obligation to rigorously consider the factual and legal grounds for placing Mr. Piskorski in pretrial detention. The source notes that the implementation of this obligation is a guarantee against arbitrary detention.

22. The source further submits that, given the definition of the crime of espionage (i.e. participation in foreign intelligence activities against Poland), there is no legal basis for accusing Mr. Piskorski of espionage activity. Involvement in international observation missions and international conferences, formation of political parties and associations, organization of foreign trips and pickets is not espionage, especially in terms of their impact on the interests of Poland. The source states that involvement in social and political activity focusing on a specific vision of a geopolitical order should not justify the criminal investigation of persons with different political views.

23. In addition, the source argues that Mr. Piskorski's activities over a seven-year period as a political scientist, journalist, academic worker, Secretary-General of the European Centre for Geopolitical Analysis and former Member of the Polish Parliament do not fall within the definition of espionage and were not contrary to the interests of Poland. Moreover, according to the source, the law does not use the concept of "information warfare" or "hybrid warfare" in criminal matters. As a result, the criminal law currently in force does not provide any grounds to penalize the activities of Mr. Piskorski. The source emphasizes that one of the principles of criminal law is that there should be no punishment without law, also known as *nullum crimen sine lege*. This principle has not been respected in Mr. Piskorski's case. The interpretation of criminal law should never lead to the recognition of an offence that, at the time of its alleged commission, was not prohibited by law. A broad interpretation of an offence cannot lead to the imposition of preventive measures, including pretrial detention.

24. Since the earliest stage of the criminal proceedings, including the first hearing on pretrial detention, Mr. Piskorski's lawyers have argued that there are no substantial grounds to characterize his political activity as espionage. This argument was presented during the investigation, with no effect. On 10 May 2017, prior to the court hearing to further extend Mr. Piskorski's pretrial detention, his lawyers submitted a legal opinion on the definition of the offence of espionage.

25. The source submits that the courts have not adequately investigated the grounds for Mr. Piskorski's pretrial detention. As a consequence, he has been deprived of his liberty in an arbitrary and unlawful way, in violation of the principle of *nullum crimen sine lege*.

Category II: substantive fundamental rights

26. The source submits that Mr. Piskorski's deprivation of liberty, including his pretrial detention of two years, is arbitrary under category II because it results from the exercise of his rights to freedom of opinion and expression guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, and his rights to freedom of peaceful assembly and association guaranteed by article 20 of the Universal Declaration of Human Rights and articles 21 and 22 of the Covenant.

27. According to the source, Mr. Piskorski has worked in the media industry and as a researcher and academic lecturer. He holds a doctoral degree in political science. He was an active politician and was engaged in a number of political and social initiatives, also on the international stage. His political views and opinions are protected by the right to freedom of opinion and expression. His public activities and initiatives, such as organizing conferences, meetings, pickets and establishing social movements are protected by the right to freedom

of peaceful assembly and association. Penalizing him for his public, political and social activities and justifying his pretrial detention on the basis of those activities constitutes an arbitrary restriction of these freedoms.

28. The source emphasizes that public authorities in a democratic State are obliged to ensure political pluralism and freedom of speech to all members of society. The social and political activity of Mr. Piskorski, even if associated with disseminating unpopular views or views incompatible with the political views of the current parliamentary majority, constituted the exercise of fundamental civil freedoms. The source highlights that Mr. Piskorski's activities were open and public.

29. According to the source, the law does not prohibit the establishment of and participation in political parties and associations, even if their views are in conflict with the existing political line or, more broadly, with a specific vision of the international political relations of the ruling political majority. Moreover, initiatives such as the creation of political parties and associations and the organization of pickets and demonstrations, even in such difficult cases as those involving relations between Poland and Ukraine or the Russian Federation, cannot be qualified as manipulating social attitudes and influencing the attitudes of Polish society, which would result in the deprivation of personal liberty. Mr. Piskorski's views differ from those of the Polish authorities, but this should not lead to his criminal repression. Everyone is entitled to hold their own opinions and political views, especially in terms of international cooperation with certain countries, and is free to manifest their own vision of a geopolitical order, including integration with certain States, or isolation from certain initiatives.

30. According to the source, article 130 (1) of the Criminal Code does not give grounds for assuming that the activities of Mr. Piskorski in the public sphere, including establishing and participating in political parties, associations and public assemblies, and organizing national and international events, are indicative of espionage. In addition, the accusations against Mr. Piskorski and his pretrial detention have deprived him of the opportunity to continue engaging in public activities.

31. Since the earliest stage of the criminal proceedings, including the first hearing on pretrial detention, Mr. Piskorski's lawyers have argued that his activities in the public sphere are protected under the freedom of assembly and association, and of speech and opinion. This argument was presented during the investigation and the hearings regarding his pretrial detention, with no effect. The source states that the courts have never commented on Mr. Piskorski's allegations regarding the breaches of his fundamental freedoms.

Category III: due process rights

32. The source submits that Mr. Piskorski's right to a fair trial was violated in the proceedings concerning his pretrial detention. These violations include: (a) limiting the ability of Mr. Piskorski and his lawyers to consult case files, particularly the requests by the National Public Prosecutor's Office to extend his pretrial detention; and (b) limiting or denying Mr. Piskorski's right to take part in court hearings and to present statements before the court.

33. According to the source, much of the evidence in Mr. Piskorski's files is classified and available only in special premises at the National Public Prosecutor's Office or in court. Mr. Piskorski and his lawyers can consult the most important classified documents only in these special premises and only within a limited time frame. They can use special notepads to make notes, but they must leave the notes in these special premises. Both the National Public Prosecutor's Office and the courts did not accept a request by Mr. Piskorski's lawyers to provide him with copies of the most important documents from the classified part of the case files, for internal use only in the special premises of the National Public Prosecutor's Office or court, and during hearings on pretrial detention. The source submits that this situation has resulted in a flagrant breach of the principle of equality of arms.

34. At the time of the source's submission, the case materials consisted of 95 non-classified volumes with 11 appendices and 24 classified volumes, each approximately 200 pages long. The written reasoning behind the Prosecutor's requests to extend Mr.

Piskorski's pretrial detention are classified, but amount to approximately 60 to 90 pages. Mr. Piskorski's lawyers were served only with the initial part of these requests regarding the criminal charges against Mr. Piskorski. Recently, the defence lawyers requested the court to provide Mr. Piskorski with his own copy of the reasoning of the latest request by the National Public Prosecutor's Office, enabling him to make notes before the court hearing on pretrial detention. However, the court refused and indicated that it was sufficient for the lawyers to consult the request before the court hearing. On one occasion, the lawyers' motion to allow Mr. Piskorski to consult the case files was rejected by the court, which pointed to the pressures of time and the upcoming end of pretrial detention. At the same time, the Prosecutor argued that Mr. Piskorski could consult the case files, including the classified reasoning of the request to extend his pretrial detention, after the hearing and following the court's decision.

35. The source also emphasizes that Mr. Piskorski's right to a defence was violated as he could only participate in some hearings on his pretrial detention, even though his lawyers had requested that he be able to participate, arguing that he was being deprived of his right to present his own personal position on the case. The source submits that the court's position on the possibility of bringing Mr. Piskorski to court hearings over the past months is inconsistent. Mr. Piskorski was brought to court to participate in several hearings regarding his pretrial detention. However, during other hearings, the court found that there was no legal basis allowing for his participation in a hearing on pretrial detention, or that it would be sufficient for him to be represented by his lawyers. During the last hearing on pretrial detention, he was brought to the courtroom during the hearing, but was not provided with sufficient time to consult the case files.

36. In addition, the source submits that Mr. Piskorski's pretrial detention hearings were adjudicated more than once by a number of judges from the Appellate Court of Warsaw. Since May 2017, the Appellate Court has ruled on the extension of his pretrial detention as a court of first and second instance. Before the last hearing on pretrial detention, Mr. Piskorski's lawyers requested the appointment of new judges to hear his case, that is, judges who had not adjudicated his case on previous occasions. One of the previous judges of the Appellate Court had decided on Mr. Piskorski's pretrial detention twice.

37. The source submits that the non-observance of the norms relating to a fair trial in the present case, including the violation of Mr. Piskorski's right to a defence and the principle of equality of arms, is of such gravity as to give his deprivation of liberty an arbitrary character under articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

Response from the Government

38. On 18 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 19 February 2018 about Mr. Piskorski's current situation. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Poland under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Piskorski.

39. On 19 February 2018, the Government requested an extension of the deadline to respond. The extension was granted with a new deadline of 5 March 2018. The Working Group regrets that, despite the extension of the deadline, the Government did not submit any information in response to the present communication.

Discussion

40. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraphs 15 and 16 of its methods of work.

41. In determining whether Mr. Piskorski's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international

requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

42. The source alleges that Mr. Piskorski's pretrial detention has been applied and extended without a legal basis. The source refers to article 249 (1) of the Code of Criminal Proceedings, which provides that preventive measures, such as pretrial detention, may only be imposed if the evidence indicates that there is a high probability that the accused committed the alleged offence. According to the source, Mr. Piskorski's conduct, including his involvement in international observatory missions and conferences and the formation of political parties, associations and pickets, does not fall within the definition of espionage under article 130 (1) of the Criminal Code and he should not have been detained. The source argues that Mr. Piskorski's activities do not constitute offences under the criminal law currently in force, and that the principle of *nullum crimen sine lege* under article 11 (2) of the Universal Declaration of Human Rights and article 15 of the Covenant has been violated.

43. The Working Group considers that the questions of whether Mr. Piskorski's actions fall within the definition of espionage, and whether his activities constitute an offence under current law, are matters for the Polish courts to determine in interpreting domestic legislation, case law and expert opinion. The source acknowledges that Mr. Piskorski's lawyers have raised the argument that there are no substantial grounds to qualify his political activity as espionage before the Polish courts, but it was not accepted. As the Working Group has emphasized in its jurisprudence, it does not substitute itself for a domestic court or act as an appellate court and, as a general rule, is not competent to evaluate whether criminal action against a detainee is supported by the evidence or whether it has been proved that an offence was committed.[1] Accordingly, the Working Group expresses no opinion on whether Mr. Piskorski's pretrial detention has a legal basis, and is unable to conclude that it is arbitrary under category I.

44. In addition, the source alleges that Mr. Piskorski has been deprived of his liberty as a result of exercising his rights to freedom of opinion and expression, and his rights to freedom of peaceful assembly and association. The Working Group considers that the source has established a credible prima facie case based on the following facts. Mr. Piskorski was active in the realm of domestic and international politics. His activities included the creation of political parties and associations, organizing conferences and participating in pickets and demonstrations, including on matters such as the relations and cooperation between Poland and other States. Those activities involved disseminating unpopular views or views incompatible with the political views of the existing parliamentary majority. Mr. Piskorski has been detained for nearly two years, effectively limiting the extent to which he can express his views in public. The Working Group notes that he was arrested less than two months before a summit of the North Atlantic Treaty Organization was held in Warsaw in July 2016.

45. In the absence of any alternative explanation from the Government, the Working Group considers that Mr. Piskorski's activities clearly fall within the boundaries of the freedom of opinion and expression, and the freedom of peaceful assembly and association, which are protected by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant. The Working Group recalls that the holding and expressing of opinions, including those that are critical of, or not in line with, official government policy, are protected under international human rights law. Importantly, there is nothing to suggest that Mr. Piskorski behaved in a violent manner or in any way incited his supporters or other individuals to commit acts of violence. In the view of the Working Group, he was peacefully exercising his rights under the Universal Declaration of Human Rights and the Covenant and has been arrested and detained for doing so.

[1] See opinion Nos. 50/2013, para. 38; 69/2012, paras. 40–42; 33/2010, para. 11; and 25/2008, paras. 15–16.

46. The Working Group considers that the permitted restrictions on the freedom of expression, peaceful assembly and association under articles 19 (3), 21 and 22 (2) of the Covenant do not apply in the present case. The burden is on the Government to show that the prosecution of Mr. Piskorski on charges of espionage is a necessary, reasonable and proportionate response to protect national security, public safety or public order, or the rights and freedoms of others. Given that the Government did not submit any information in response to the Working Group's request, it has not met this burden. In any event, in paragraph 5 (p) of its resolution 12/16, the Human Rights Council calls on States to refrain from imposing restrictions that are not consistent with international human rights law, including restrictions on the discussion of government policies and political debate; reporting on human rights, government activities and corruption in Government; peaceful demonstrations or political activities; and the expression of opinion and dissent.

47. Furthermore, the Working Group finds that, at the time of his arrest and detention in May 2016, Mr. Piskorski was a Chair of the newly formed political party, Change (Zmiana), having previously served as a Member of the Polish Parliament. He was also the Secretary-General of a well-known think-tank, which deals with geopolitics. The Working Group is of the view that his detention resulted from the exercise of his right to take part in the Government of his country, and the right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant. Mr. Piskorski has also been deprived of his liberty based on his political or other opinion, contrary to articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and in violation of his rights to equality before the law and equal protection of the law.

48. The Working Group concludes that Mr. Piskorski has been deprived of his liberty as the result of the peaceful exercise of his rights to freedom of opinion and expression, freedom of assembly and association, and the right to take part in the Government of his country and the conduct of public affairs, under articles 19, 20 and 21 (1) of the Universal Declaration of Human Rights and articles 19, 21, 22 and 25 of the Covenant. His deprivation of liberty is therefore arbitrary under category II. The Working Group refers this case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association for further investigation.

49. Given its finding that the deprivation of liberty of Mr. Piskorski is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Piskorski should take place in future. However, it appears likely from the information presented by the source that the proceedings against Mr. Piskorski will continue to trial.

50. The Working Group considers that the information provided by the source discloses several violations of Mr. Piskorski's right to a fair trial. The Working Group notes that it has been two years since Mr. Piskorski was detained in May 2016 and he has been held in pretrial detention for that entire period. While the preparation of the case against Mr. Piskorski involves complex espionage charges, the Government has offered no explanation as to why this process has taken nearly two years. There is no apparent end in sight to the constant renewal of Mr. Piskorski's pretrial detention and, although his detention is kept under regular review every three months, he is effectively being detained indefinitely. Given the extensive delay, the courts must reconsider alternatives to detention.[2] The right to be tried within a reasonable time and without undue delay is one of the fair trial guarantees embodied in articles 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the Covenant, and it has been violated in the present case. If Mr. Piskorski cannot be tried within a reasonable time, he is entitled to release under article 9 (3) of the Covenant. Prolonged pretrial detention may also be placing Mr. Piskorski's right to be presumed innocent in jeopardy. The Working Group has emphasized that pretrial

[2] See Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 37.

detention must be as short as possible because it constitutes a grave limitation on freedom of movement, which is a fundamental and universal human right.[3]

51. In addition, the source alleges that much of the evidence in Mr. Piskorski's files is classified and available only in special premises at the National Public Prosecutor's Office or in court. The source claims that Mr. Piskorski and his lawyers can consult the most important classified documents only in these special premises and only within a limited time frame. They can use special notepads to make notes, but they must leave them at the premises. Both the National Public Prosecutor's Office and the courts did not accept a request by Mr. Piskorski's lawyers to provide him with copies of the most important documents from the classified part of the case files. According to the source, the classified materials consist of 24 volumes, each of them running to approximately 200 pages. The written reasoning behind the Prosecutor's requests for the extension of Mr. Piskorski's pretrial detention are also classified, and consist of approximately 60 to 90 pages.

52. As the Working Group has stated, every individual deprived of liberty has the right to access material related to the detention or presented to the court by the State in order to preserve the equality of arms, including information that may assist the detainee in arguing that the detention is not lawful or that the reasons for the detention no longer apply.[4] However, this right is not absolute, and the disclosure of information may be restricted if such a restriction is necessary and proportionate in pursuing a legitimate aim, such as protecting national security, and if the State has demonstrated that less restrictive measures would be unable to achieve the same result, such as providing redacted summaries that clearly point to the factual basis for the detention.[5]

53. In the present case, the Working Group considers that the Government has failed to allow Mr. Piskorski and his lawyers fair access to classified information, particularly the classified reasons of the National Public Prosecutor's Office for seeking pretrial detention. The general description of those reasons, including that there is a high probability that Mr. Piskorski committed the offence, or that he might go into hiding or obstruct the proceedings, do not allow his lawyers to challenge the detention and have it reviewed on substantive grounds. This is a serious violation of the principle of the equality of arms under article 10 of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) of the Covenant to a fair hearing and to have adequate time and facilities for the preparation of his defence "in full equality".[6] Moreover, the Government did not submit any information in response to the Working Group's request, and has therefore not demonstrated why restricting access to classified information is necessary and proportionate in pursuing a legitimate aim, such as national security. It has also failed to demonstrate that less restrictive means, such as redacted summaries, providing copies of documents to Mr. Piskorski for use within the National Public Prosecutor's Office (as requested by his lawyers) or other means of accommodation would be unable to achieve the same result. The Working Group considers that allowing Mr. Piskorski to access the most important documents in limited circumstances (i.e. within special premises, under a limited time frame and leaving notes behind) is not a reasonable accommodation given the volume of documents in this case.

54. Furthermore, the source submits that Mr. Piskorski's right to present a defence was violated as he could only participate in some hearings on his pretrial detention, even though his lawyers requested that he be able to participate at the hearings. The source alleges, and the Government has not denied, that Mr. Piskorski was brought to court to participate in several hearings regarding his pretrial detention, but during other hearings, the court found that there was no legal basis allowing for his participation in a hearing on pretrial detention, or that it would be sufficient for him to be represented by his lawyers. The Working Group

[3] See A/HRC/19/57, paras. 48–58.

[4] United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (the "United Nations Basic Principles and Guidelines"), principle 12 and guideline 13.

[5] Ibid., guideline 13, paras. 80–81.

[6] See, for example, opinions No. 89/2017, para. 56; No. 50/2014, para. 77; and No. 19/2005, para. 28 (b), in which the Working Group reached a similar conclusion on the violation of the principle of equality of arms when classified information is withheld from the defendant.

considers that Mr. Piskorski has the right to appear in person at all of his pretrial detention hearings.[7]

55. The Working Group has confirmed that courts should guarantee the physical presence of the detainee, especially for the first hearing of the challenge to the lawfulness of the detention, and every time that the detainee requests to appear in person before the court.[8] Moreover, as the Human Rights Committee has stated, every detainee has the right to appear physically before the judge or other officer authorized by law to exercise judicial power. The physical presence of detainees at the hearing may assist the inquiry into the lawfulness of detention, and serves as a safeguard for the right to security of person and the prohibition against torture and other cruel, inhuman or degrading treatment.[9]

56. Finally, the Working Group takes note of the source's allegation that, since May 2017, the Appellate Court has ruled on the extension of Mr. Piskorski's pretrial detention as a court of first and second instance. The source reports that, before the last hearing on pretrial detention, Mr. Piskorski's lawyers requested the appointment of new judges that had not adjudicated on his case on previous occasions. The source did not elaborate further on this submission. The Working Group recalls that the Covenant does not require that a court decision upholding the lawfulness of detention be subject to appeal.[10] However, in the view of the Working Group, if a State provides such an appeal or further instances of review, it must meet the standard of impartial and independent review required under article 9 (3) and (4) of the Covenant. The Working Group considers that, if judges determining the legality of Mr. Piskorski's detention are sitting at both first and second instance in an appeal from the initial determination of the legality of detention, this does not meet the requirements of article 9 (3) and (4) of the Covenant. As the Working Group has stated, the court reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered the detention.[11]

57. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. Piskorski an arbitrary character according to category III. The Working Group also considers that the above violations, taken together, suggest that further investigation of the independence of the judiciary in hearing Mr. Piskorski's case is warranted. Accordingly, the Working Group refers this matter to the Special Rapporteur on the independence of judges and lawyers.

Disposition

58. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Mateusz Piskorski, being in contravention of articles 2, 7, 9, 10, 11 (1), 19, 20 and 21 (1) of the Universal Declaration of Human Rights and of articles 2 (1), 9, 14, 19, 21, 22, 25 (a) and 26 of the Covenant, is arbitrary and falls within categories II and III.

59. The Working Group requests the Government of Poland to take the steps necessary to remedy the situation of Mr. Piskorski without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

60. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Piskorski immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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[7] See also opinion No. 9/2018, para. 50.

[8] United Nations Basic Principles and Guidelines, principle 11 and guideline 10.

[9] See general comment No. 35, paras. 34 and 42. See also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 32 (2) and 37.

[10] See general comment No. 35, para. 48. See also the United Nations Basic Principles and Guidelines, guideline 7, para. 66.

[11] United Nations Basic Principles and Guidelines, guideline 4, para. 51. See also principle 6.

61. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Piskorski, and to take appropriate measures against those responsible for the violation of his rights.

62. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to (a) the Special Rapporteur on freedom of expression, (b) the Special Rapporteur on freedom of peaceful assembly and of association, and (c) the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

Follow-up procedure

63. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Piskorski has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Piskorski;

(c) Whether an investigation has been conducted into the violation of Mr. Piskorski's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Poland with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

64. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

65. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

66. The Government should disseminate through all available means the present opinion among all stakeholders.

67. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[12]

[*Adopted on 20 April 2018*]

[12] See Human Rights Council resolution 33/30, paras. 3 and 7.